Supreme Court, U.S.
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No. 90-1782

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFLEX CORPORATION,

Petitioner,

v.

UNDERWRITERS LABORATORIES INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner has misstated the question presented. Properly stated, the question is:

Whether the taxation of costs for deposition transcript copies and deposition subpoena service fees is authorized by 28 U.S.C. § 1920?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Underwriters Laboratories Inc. ("UL")[1] respectfully requests that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the decision of the Ninth Circuit Court of Appeals ("Opinion").[2]

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[1] Respondent Underwriters Laboratories Inc. has no parent companies, subsidiaries or affiliates.

[2] The opinion is reprinted in the Appendix to the Petition for Certiorari ("A-____"). The order of the district court, Order Re Plaintiff's and Defendant's Motions to Retax Costs, is reprinted in the Appendix to this brief ("RA-____").

ADDITIONAL RELEVANT LEGAL AUTHORITY

Rules 4(c) and 45(c) of the Federal Rules of Civil Procedure and applicable sections of Rule 16.4 of the Local Rules of the United States District Court of the Central District of California are reprinted in the Appendix to this Brief at RA-3-5.

STATEMENT OF THE CASE

Petitioner, Alflex Corporation ("Alflex"), filed an action against UL in the Central District of California for alleged violations of the Lanham Act and related state law claims. The district court granted summary judgment in favor of UL, and the United States Court of Appeals for the Ninth Circuit affirmed. Alflex filed a petition for writ of certiorari on the merits, which is Petition No. 90-1781.

The district court also awarded UL $49,090.15 in costs, and Alflex filed an appeal, challenging $16,979.76 of the costs award, $15,655.06 for copies of deposition transcripts and $1,324.70 for deposition subpoena service fees. The Ninth Circuit affirmed, and Alflex filed a petition for writ of certiorari on these cost items to which UL responds herein.

REASONS FOR DENYING THE WRIT

Alflex fails to present an issue which merits review because: (i) the Ninth Circuit opinion below is not in conflict with *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); (ii) the Ninth Circuit's reading of 28 U.S.C. § 1920 does not threaten a single national standard for taxation of costs; and (iii) the lone decision cited by Alflex as contrary to the Ninth Circuit's approval of the award of deposition subpoena service fees of $1,324.70 does not create a "conflict with other circuits" that justifies this Court's review.

I.

The Ninth Circuit Opinion Is Not In Conflict With This Court's Decision In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987)

Alflex has mischaracterized this Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) in an effort to portray a conflict where none exists. In *Crawford*, the Court rejected petitioners' argument that Rule 54(d), Fed. R. Civ. P., "is a separate source of power to tax as costs expenses not enumerated in § 1920." *Id.* at 441. The Ninth Circuit, here, did not base its decision on Rule 54(d) as a "separate source of power" in affirming the cost award. Instead, consistent with *Crawford*, the court relied on the provisions of §1920(1) and (2). A-11-12, A-15-18.

Contrary to Alflex's suggestion, *Crawford* does not hold that § 1920 is to be given the narrowest possible reading. Petition, pp. 5-6. In *Crawford*, the Court was addressing an unambiguous thirty dollar per day restriction on wit-

ness fees, which petitioners sought to avoid under the authority of Rule 54(d). *Id.* at 442; 28 U.S.C. §§ 1821, 1920. While ruling that courts may not rely on Rule 54(d) as authority to go beyond § 1920, the Court did not reject the body of law that has developed in the lower courts interpreting the language of § 1920 itself. Necessarily, the lower courts have given a practical meaning to "Congress' considered choice as to the kinds of expenses that a federal court may tax as costs." *Id.* at 440.

Alflex admits that the "plain words" of § 1920(2), "Fees of the court reporter for . . . the stenographic transcript," have been properly interpreted by this Court and by other courts to include a deposition transcript even though these "plain words" do not specifically mention depositions. Petition, p. 8; A-8-9 n.3; 6 *Moore's Federal Practice* ¶ 54.77[4], at 54-417-418 (2d ed. 1990). Thus, the courts have given § 1920 a natural reading in light of the realities of modern litigation to include deposition as well as hearing transcripts. *Hudson v. Nabisco Brands, Inc.*, 758 F.2d 1237, 1242-43 (7th Cir. 1985).

Nevertheless, Alflex fixates on the singular form of the noun, "transcript," to argue that the statute cannot reasonably be read to allow recovery of the costs of a *copy* of a deposition transcript, that Congress could only have intended "transcript" to mean the "*original.*" Petition, p. 8. These were depositions taken by petitioner, of which UL received only one copy. Alflex's position that "deposition" may be read into § 1920(2), but "deposition copy" may not, is inherently illogical and unreasonable. No support for such a half practical/half literal interpretation of § 1920 is found in *Crawford.*

For almost thirty years, courts have read § 1920(2) to include deposition copies as a recoverable cost. *United States v. Kolesar*, 313 F.2d 835, 838-39 (5th Cir. 1963);

Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 678 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963); *SCA Services, Inc. v. Lucky Stores*, 599 F.2d 178, 181 (7th Cir. 1979).[3] This interpretation has been codified in the local rules of numerous federal district courts, including the district court below. *See, e.g.*, Local Rules of the United States District Court of: the Central District of California, Rule 16.4.6(a); the Northern District of Illinois, Rule 45(b); the District of Columbia, Rule 214(d)(6); the Eastern District of Wisconsin, Rule 9.02(b); the Eastern District of New York, Rule 11(c)(2); and Standing Order (M-10-468) of the Board of Judges of the Southern District of New York, Item (2), dated April 20, 1990.

The court below properly concluded that *Crawford* did not overrule these cases, invalidate these local rules and prohibit the award of costs for deposition copies under § 1920. A-10-12. Other circuit courts, awarding such costs after *Crawford*, have arrived at the same conclusion. *Northbrook Excess and Surplus Insurance Co. v. Procter & Gamble Co.*, 924 F.2d 633, 642-643, 644 n.15 (7th Cir. 1991); *SK Hand Tool Corp. v. Dresser Industries, Inc.*, 852 F.2d 936, 944 (7th Cir. 1988), *cert. denied*, 492 U.S. 918 (1989); *West Wind Africa Line, Ltd. v. Corpus Christi Marine Services, Co.*, 834 F.2d 1232, 1237-38 (5th Cir. 1988). The only case cited by Alflex in support of its interpretation of *Crawford*, *Viacao Aerea Sao Paulo, S.A. v. International Lease Finance Corp.*, 119 F.R.D. 435

[3] *See, e.g., Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1553 (5th Cir. 1984) (recovery of costs of copies of depositions called by successful party); *Govas v. Chalmers*, 1991 U.S. Dist. LEXIS 7653 at 2-4 (N.D. Ill. June 5, 1991); *Morrissey v. County Tower Corp.*, 568 F. Supp. 980, 983 (E.D. Mo. 1983); *Murphy v. Amoco Production Co.*, 558 F. Supp. 591, 594 (D. N.D. 1983), *aff'd*, 729 F.2d 552 (8th Cir. 1984); *Principe v. McDonald's Corp.*, 95 F.R.D. 34, 37 (E.D. Va. 1982); *Lockett v. Hellenic Sea Transports, Ltd.*, 60 F.R.D. 469, 472 (E.D. Pa. 1973).

(C.D. Cal. 1988), was specifically overturned by the Ninth Circuit in the opinion below. A-10; Petition, pp. 9-10.

Similarly, the award of deposition subpoena service fees here falls within 28 U.S.C. § 1920(1), allowing for the taxation of the fees of the marshal. The Ninth Circuit noted that 28 U.S.C. § 1921 provides for the collection of fees for serving subpoenas by the marshal and that Fed. R. Civ. P. 4(c) and 45(c) have been amended to prohibit service of subpoenas by the marshal in the circumstances present in this case, but, alternatively, to allow service by others. A-15-16. The court reasoned that "Congress exhibited an intent to make service of process a taxable item" and that, since "the Marshal is no longer involved as often in the serving of summonses and subpoenas, the cost of process servers should be taxable under 28 U.S.C. 1920(1)." A-16-18 (footnote omitted).

Most courts that have addressed the issue have reached the same conclusion. *See Roberts v. Homelite Div. of Textron, Inc.*, 117 F.R.D. 637, 641 (N.D. Ind. 1987). *See also In re Howard*, 1991 Bankr. LEXIS 695 at 6 (D. Md. April 30, 1991) (majority of courts allow fees of private process servers as costs under § 1920(1)); *Tang How v. Edward J. Gerrits, Inc.*, 756 F. Supp. 1540, 1545 (S.D. Fla. 1991); *Harrington v. City of Portland*, 1990 U.S. Dist. LEXIS 15102 at 10 (D. Ore. November 7, 1990); *Cross v. General Motors Corp.*, 563 F. Supp. 368, 370 (E.D. Mo. 1982), *aff'd*, 721 F.2d 1152 (8th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984). This interpretation has also been codified by federal district courts in their local rules. *See, e.g.*, the Local Rules of the United States District Court of: the Central District of California, Rule 16.4.2; the Eastern District of California, Rule 292(f)(2); and Standing Order (M-10-468) of the Board of Judges of the Southern District of New York, Item (10), dated April 20, 1990.

Other than *Viacao*, overruled by the court below, Alflex cites only one case purportedly holding a contrary view on this issue: *Crues v. KFC Corp.*, 768 F.2d 230, 234 (8th Cir. 1985). Petition, p. 12. *Crues*, decided before *Crawford*, offers no compelling rationale for denying such costs. Indeed, the court in *Crues* does not indicate whether it even considered the effect of the 1983 amendments to Fed. R. Civ. P. which eliminated marshal service of subpoenas in most cases. *Id.* at 234. Further, KFC submitted a bill for costs relating to a 1982 trial and a 1984 retrial in the case, but it is not apparent from the opinion whether the marshal was still available for service of process at the time the costs at issue were incurred. *Id.* at 232, 234-35. Given these two critical distinctions, it is by no means apparent that the Eighth Circuit would rule any differently than the court below.

Alflex would have this Court completely eliminate recovery of subpoena service fees in most cases despite Congress' clear intent to the contrary. Alflex's interpretation would render § 1920 meaningless much as the petitioner's proposed interpretation would have done in *Crawford*, except that, here, Alflex is attempting to *delete* rather than add categories of taxable costs. *Crawford*, *supra* at 441-42. Petition, p. 9. By contrast, the court below, with due consideration for the concerns expressed in *Crawford*, allowed recovery specifically for the "kinds of expenses" enumerated by Congress under § 1920. *Id.* at 440. A-6-7, A-10-14.

II.

The Ninth Circuit's Decision Is Consistent With A Single National Standard For Taxation of Costs

Alflex argues that the Ninth Circuit's taxation of the costs is based upon an "implied" rather than an "express"

meaning of 28 U.S.C. § 1920 and will therefore prevent "national uniformity" in the taxation of costs by federal courts. Petition, pp. 10-11. Yet, it is Alflex that attempts to disturb the national standard that has been developed by the courts interpreting §1920. As discussed above, the courts that have addressed these issues, in case law or local rules, have generally recognized that deposition copies and private process service fees are recoverable costs under the authority of § 1920. The result has been a consistent interpretation of the provisions at issue, awarding costs that Congress has clearly shown an intention to allow.

On the other hand, *Viacao Aerea*, upon which Alflex relies most heavily, was a maverick decision of a district court judge, in contravention of the local court rules. *Viacao Aerea, supra* at 438-39. The decision was never followed or cited, even within the Central District of California, was ignored completely by the district court below and was overruled by the Ninth Circuit. A-10. No other court has adopted a similar view of § 1920 under the auspices of this Court's *Crawford* decision or under any other authority. Thus, *Viacao*, not the Ninth Circuit's opinion, is the aberration. The Ninth Circuit has not overlooked "a question of national importance," as Alflex suggests. Petition, p. 11.

III.

The Lone Decision Relied On By Petitioner On The Award Of Deposition Service Fees Does Not Create A "Conflict With Other Circuits" That Justifies Review

Alflex implies that the opinion below affirming an award of $1,324.70 for private process server fees "is in conflict with other circuits" which have adopted a "stricter view

of *Crawford*." Petition, pp. 11-12. However, Alflex cites only one circuit court decision that actually denies this item of costs: *Crues v. KFC Corp.*, *supra*. Petition, p. 12. In *Crues*, the Eighth Circuit instructed the district court not to award "special process server" fees. *Id.* at 234. As discussed above, there is no evidence that the Eighth Circuit considered the 1983 amendments to Fed. R. Civ. P. 4(c) and 45(c) which effectively eliminated process service by marshals. Nor is it clear whether the costs at issue in *Crues* were incurred after these amendments became effective, or, indeed, that the Eighth Circuit would decide the case in the same manner today. *See* p. 7, *supra*.

Even if *Crues* were considered to be in conflict with the decision below, such a conflict, between two circuits, would be insufficient to merit review. Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983); Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982). *See also McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 6, 1991

RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFLEX CORPORATION, a California corporation,	) Case No. CV 87-3344 (JGD)
Plaintiff,	) ORDER RE
v.	) PLAINTIFF'S AND DEFENDANT'S
UNDERWRITERS LABORATORIES INC., a Delaware corporation,	) MOTIONS TO RETAX COSTS
Defendant.	)

The motions of defendant Underwriters Laboratories, Inc. and plaintiff Alflex Corporation to retax costs came on regularly for hearing on July 24, 1989, in the United States District Court before the Honorable John G. Davies. After full consideration of the moving and responding papers, all supporting papers and exhibits, the file in this case, and the oral argument of counsel, the Court rendered its decision.

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion to Retax Costs is denied in its entirety;
2. Defendant's Motion to Retax Costs is granted in the following respects:
   (a) Service of process fees in the sum of $1,324.70 are awarded.
   (b) Photocopying costs in the sum of $3,107.80, minus $288.60 already awarded.

(c) The claim for additional deposition costs in the sum of $1,424.01 is also awarded.

3. Defendant's request for expedited delivery costs for transcription of depositions to computer disks is not allowed.

Therefore, in conjunction with the previous findings of the Clerk, defendant Underwriters Laboratories, Inc. is entitled to recover the following costs from plaintiff Alflex Corporation:

1. Deposition costs in the amount of $44,253.25 ($42,829.24 awarded by the Clerk plus an additional $1,424.01);
2. $693.00 in non-party witness fees and filing fees;
3. Service of process fees of $1,324.70;
4. Photocopying costs of $2,819.20 ($3,107.80 minus $288.60 already awarded).
5. Total awarded: $49,090.15.

DATED: August 4, 1989

John G. Davies
United States District Judge

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(c)

(1) Process, other than a subpoena or a summons and complaint, shall be served by a US marshal or deputy US marshal, or by a person specially appointed for the purpose.

(2) (A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a US marshal or deputy US marshal, or by a person specially appointed by the court for that purpose, only—

(i) on behalf of a party authorized to proceed *in forma pauperis* pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28 U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a US marshal or deputy US marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the

person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope postage prepaid, addressed to the sender. If no acknowledgment of service of this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) the notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) the court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

Rule 45(c) Service

A subpoena may be served by the marshal, by a deputy marshal, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the U.S. or an officer or agency thereof, fees and mileage need not be tendered.

LOCAL RULES FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

16.4 *Items taxable as costs.* The following items are taxable as costs:

16.4.2 *Fees for service of process.* Fees for service of process (whether served by the United States Marshal or other persons authorized by FR Civ P4).

16.4.6 *Depositions.* Costs incurred in connection with taking depositions, including

(a) The cost of the original and one copy of all depositions used for any purpose in connection with the case.